

**UNDER**

**THE INQUIRIES ACT 2013,**

**New Zealand**

**IN THE MATTER OF**

**A GOVERNMENT INQUIRY INTO  
OPERATION BURNHAM AND  
RELATED MATTERS**

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**THE LEGAL PRINCIPLES RELATING TO THE PREDETERMINED AND  
OFFENSIVE USE OF FORCE WITH PARTICULAR REFERENCE TO THE  
JOINT PRIORITISED EFFECTS LIST (JPEL)**

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**Introduction**

1. I have been asked to provide an expert opinion on the international law issues arising from the use of the Joint Prioritised Effects List (JPEL) to identify insurgents who could be killed or captured in the non-international armed conflict in Afghanistan in 2010-2012. In particular, I have been asked to advise on the international legal principles and rules that govern predetermined and offensive use of force against identified individuals in the context of that armed conflict.
  
2. It has been reported that the JPEL is a list of individuals that coalition forces in Afghanistan were authorised to capture or to target with lethal force. In other words, to place a person on the list opens up the possibility that the individual in question may be subject to a targeted killing. A targeted killing is defined for this purpose as a predetermined and offensive use of lethal force against an individual who was identified

in advance of the operation and specifically selected as being liable to have such force used against him or her.

3. Whether a targeted killing (that arises from being placed on the JPEL) is lawful as a matter of international law will depend on a number of considerations. In the first place, it will depend on the law that is applicable to such an operation. There are two bodies of international law that will potentially apply in determining whether a state can subject an individual to lethal force in the context of an armed conflict such as that which the New Zealand Defence Force (NZDF) were engaged in in 2010. First of all, there is the Law of Armed Conflict (LOAC) which is also referred to as International Humanitarian Law (IHL). This is the law that is specifically designed to govern the conduct of participants in an armed conflict. Secondly, it is possible that International Human Rights Law (IHRL) applies in the context of an armed conflict, and, if so, the state would be bound to respect the right to life of individuals. This opinion will consider what these bodies of law provide for, the extent to which they apply in a situation of armed conflict, such as existed in Afghanistan, and the relationship between them.
4. The first part of the opinion will provide an overview of the rules relating to targeting that are contained in IHL. After setting out the basic rules with regard to who may and may not be targeted as a matter of IHL, Part I will consider the precautions which ought to be taken in making those determinations, before engaging in a more extensive discussion of who is and is not a civilian in a non-international armed conflict. This part of the opinion will consider the criteria for determining membership of an organized group and examine the notion of direct participation in hostilities. With regard to the latter, the opinion considers both the material and the temporal dimensions of direct participation in hostilities, i.e, what amounts to direct participation in hostilities, and for how should it be considered that a person is taking a direct part in such hostilities? The last two sections of Part I apply the relevant principles of IHL to the hypothetical scenario that was provided for in my brief, and consider whether IHL requires a “capture rather than kill” approach.
5. Part II of the opinion considers the application of human rights in the conflict in Afghanistan, examining 3 critical questions: (i) human rights law apply in armed conflict situations?; (ii) human rights treaty obligations apply extraterritorially?; and (iii) what is

the relationship between IHL and IHRL. The opinion concludes with a very brief examination of human rights law and targeted killings in armed conflict.

## **PART I - Targeting in International Humanitarian Law**

6. IHL applies to armed conflict. According to the International Criminal Tribunal for the former Yugoslavia (ICTY):

“an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or in the case of internal conflicts, a peace settlement is achieved. Until that moment, international humanitarian law continues to apply to the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.”<sup>1</sup>

7. As the ICTY suggests in that quote, it is important to distinguish between a conflict between states (an international armed conflict) and between a state and a non-state group or between non-state groups (a non-international armed conflict). This is because the rules of IHL that apply in an international armed conflict are sometimes different from those applicable in a non-international conflict. The conflict in Afghanistan in 2010 was a non-international armed conflict. This is because it was a conflict between, the government of that state and coalition partners operating on the territory of Afghanistan (with the consent of the Afghan government), on the one hand, and insurgent groups on the other hand.
8. In general, the relevant rules with regard to targeting of persons in a non-international armed conflict are to be found in the Second Additional Protocol (of 1977) to the Geneva

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<sup>1</sup> *Prosecutor v. Tadic* (Jurisdiction Appeal), para. 70, (ICTY, 2005).

Conventions of 1949 (Additional Protocol II)<sup>2</sup> and in customary international humanitarian law. As compared to the law applicable in international armed conflicts, the relevant *treaty* rules regarding targeting in a non-international armed conflict are very limited and most of the relevant applicable rules are to be found in customary international law. In addition, the limited rules to be found in Additional Protocol II regarding targeting are now regarded as reflecting customary international law.<sup>3</sup>

9. Under international humanitarian law, the principle of distinction requires that parties to an armed conflict, whether international or non-international, must distinguish between civilians and combatants. They must not make civilians the object of an attack, and attacks must only be directed at combatants (the principle of distinction).<sup>4</sup> The prohibition on subjecting civilians to direct attack applies “unless and for such time as they a direct part in hostilities.”<sup>5</sup>
10. Thus, there are two grounds on which it would permissible, under IHL, to subject a person to predetermined and offensive force:

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<sup>2</sup> Although New Zealand is a party to Additional Protocol II (having acceded to the Protocol on 8 February 1988), that treaty was not applicable to New Zealand’s operations in Afghanistan. This is because that treaty only applies to internal armed conflicts within the territory of a party. See Article 1(1), Additional Protocol II, which stipulates that the Protocol applies to armed conflicts “which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol” (emphasis added). Thus, the treaty does not apply to extra-territorial non-international armed conflicts such as that between the coalition forces in Afghanistan and insurgent forces.

<sup>3</sup> See Henckaerts & Doswald-Beck, *Customary International Humanitarian Law* (International Committee of the Red Cross, 2005), “This study provides evidence that many rules of customary international law apply in both international and non-international armed conflicts and show the extent to which State practice has gone beyond existing treaty law and expanded the rules applicable to non-international armed conflicts. In particular, the gaps in the regulations of the conduct of hostilities in Additional Protocol II have largely been filled through State practice, which has led to the creation of rules parallel to those in Additional Protocol I, but applicable as customary law to non-international armed conflicts.” p. xxix (*ICRC Customary International Humanitarian Law Study*). See also *Prosecutor v. Tadic* (Jurisdiction Appeal), para. 127, (ICTY, 2005): “Notwithstanding ... limitations, it cannot be denied that customary rules have developed to govern internal strife. These rules ... cover such areas as protection of civilians from hostilities, in particular from indiscriminate attacks, protection of civilian objects, in particular cultural property, protection of all those who do not (or no longer) take active part in hostilities, as well as prohibition of means of warfare proscribed in international armed conflicts and ban of certain methods of conducting hostilities.”

<sup>4</sup> Art. 13(2), Additional Protocol II; *ICRC Customary International Humanitarian Law Study*, Rule 1.

<sup>5</sup> Art. 13(3), Additional Protocol II; *ICRC Customary International Humanitarian Law Study*, Rule 6.

- i. The person is not a civilian; or
- ii. The person is a civilian but is taking a direct part in hostilities at the time when they are the object of the attack.

### **Precautions in Attack**

11. IHL imposes an obligation on those involved in compiling the JPEL to make determinations as to the status or conduct of the persons under consideration for inclusion on the list. The obligation to refrain from subjecting civilians to direct attack, (unless they are taking a direct part in hostilities) is one that applies at the moment when the attack is conducted. Thus, there is an obligation to ensure that these determinations are kept up to date such that *at the time when force is actually applied* the state can satisfy itself that the individual concerned is not a civilian, or, if they are, is taking a direct part in hostilities at that time.
12. Customary international law applicable in non-international armed conflict imposes obligations on the parties to a conflict to take precautions in attack. This includes the obligation to do everything feasible to verify that targets are military objectives.<sup>6</sup> In other words there is an obligation to verify, while planning for, and at the moment of attack, that a target is not a civilian protected from direct attack. There is also an obligation to do everything feasible to cancel or suspend an attack if it becomes apparent that the target is not a military objective (for example, because it turns out that the person to be attacked is a civilian).<sup>7</sup> Thus, right up to the moment when an attack is being carried out against a person on the JPEL there is an obligation to (re)assess whether that person is a civilian who benefits from the protections of IHL. The obligation will require an assessment of the most recent intelligence regarding the individual in question. Where there is doubt as to whether a person is a civilian or not or as to whether they are taking a direct part in hostilities, they must be presumed to be civilians and not taking a direct part in hostilities.

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<sup>6</sup> ICRC Customary International Humanitarian Law Study, Rule 16.

<sup>7</sup> ICRC Customary International Humanitarian Law Study, Rule 18.

## **Who is (not) a Civilian in a Non-International Armed Conflict?**

13. Determining whether an individual is a civilian, and thus protected from direct attack, or not is usually more complicated in non-international armed conflicts. This is because the law regarding the principle of distinction is less clear in such conflicts and also because the factual matrix of such conflicts is usually more complex than international (or inter-state) conflicts. With regard to the facts, complexity arises because many non-state armed groups do not have clearly defined membership structures, and it is often the case that persons will occasionally fight on behalf of those groups but also engage in normal civilian activities (the “farmer by day and fighter by night”). Also, many such groups do not wear uniforms or have other fixed distinctive sign or indicia which make the members of the group easily distinguishable from the general civilian population.
14. The legal criteria for assessing who is a civilian in a non-international armed conflict are not clearly set out in any treaty text.<sup>8</sup> Although Additional Protocol II uses the term “civilian” in a number of provisions, no definition is provided. There are two possible approaches to determining who is a civilian in non-international armed conflicts, with the second approach capable of being sub-divided into two variants:
  - a) The first approach suggests that in a manner similar to the position in international armed conflicts, where a distinction is made between civilians and combatants, a distinction is to be made, in non-international armed conflicts, between “civilians” and “members of organized armed groups” or “fighters”. Members of organized groups (or fighters in this context) are those individuals who are not protected by law from direct attack. They may be made the object of attack without an inquiry being conducted into whether the individual is at that moment taking a direct part in hostilities. This approach is that adopted by the ICRC in its *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*.<sup>9</sup>

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<sup>8</sup> In international armed conflicts, the definition of a civilian is set out in Art. 50(1) of the First Additional Protocol (of 1977) to the Geneva Conventions of 1949 (Additional Protocol I).

<sup>9</sup> Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC, 2009) (ICRC’s *Interpretive Guidance on Direct Participation in Hostilities*). Principle II states that: “For the purposes of the principle of distinction in non-international armed conflict, all persons who

- b) The second approach is to consider that in a non-international armed conflict all persons other than members of the state's armed forces are civilians. Thus, all those who fight for the non-state armed group are civilians. However, such persons may be attacked where they are taking a direct part in hostilities. There are then two variations of this approach, which depend on how the broadly or narrow the concept of direct participation in hostilities is construed:
- i. On one approach membership in an organized armed group means that the individual is taking a direct part in hostilities continuously (the Continuous Direct Participation in Hostilities approach). This appears to be the approach taken by the New Zealand Defence Force in Afghanistan.<sup>10</sup> On this approach, a person who is a member of such a group can be targeted for so long as they remain a member of the group<sup>11</sup>
  - ii. On another approach mere membership of a group does not in and of itself amount to direct participation in hostilities. It will need to be shown that the individual has engaged in specific acts during hostilities, and, if so, the individual can only be targeted while they engage in such acts (and perhaps immediately prior and after such acts). This is the most restrictive of the possible approaches as it would only permit targeting at the point where an individual is actually engaged in hostilities and not on the basis of membership of an insurgent group and possibly not even on the basis of future engagement in hostilities.

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are not members of State armed forces or organized armed groups of a party to the conflict are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities. In non-international armed conflict, organized armed groups constitute the armed forces of a non-State party to the conflict and consist only of individuals whose continuous function it is to take a direct part in hostilities (“continuous combat function”).”

<sup>10</sup> See *Legal Brief: Law of Armed Conflict Rules of Engagement, Operation Wātea*, slides 32: “In an internal armed conflict, all persons not members of the State’s armed forces are civilians and entitled to protection against direct attack unless and for such time as they take a direct part in hostilities (DPH); slides 34 & 35 “What is DPH? . . . (3) An individual who is a member of an organized armed group that collectively takes a direct part in hostilities is also DPH for the time that the individual is a member . . .”.

<sup>11</sup> This also appears to be the approach taken by the Supreme Court of Israel (High Court of Justice) in *Public Committee Against Torture in Israel v Govt of Israel* (13 Dec. 2006), esp. para. 39.

15. Although the first approach and the first variant of the second approach are conceptually distinct, in practice they lead to practically equivalent results. On both approaches a member of an organized armed group may be subjected to attack simply on the basis of membership in that armed group. On both approaches, there is no requirement that the individual be attacked at the moment when he or she is engaging in a specific act that forms part of the hostilities. Taking either approach would require answering the difficult question of when does a person become a member of an organized armed group and when does he or she cease to be so.
16. In my view, the position that members of an organized armed group are not civilians and thus do not benefit from the protections against direct attack is preferable to the view that such persons are civilians but are taking a direct part in hostilities continuously. I take this view because it has a greater degree of conceptual coherence with the structure of the law of armed conflict since: (i) the concept of an armed conflict implies an activity with opposing parties, rather than with civilians; (ii) the text and structure of the provisions that deal with direct participation in hostilities suggest a narrow approach; and (iii) once the concept of continuous direct participation in hostilities is adopted, there is the danger that this wide approach will bleed into an extensive approach to the concept even in non-membership cases.
17. To adopt the second variant of the second approach, that all who fight on the non-state side are civilians, but that they can only be targeted in the narrow circumstance in which they engage in specific acts which amount to direct participation in hostilities would be unduly restrictive for the state. While such an approach would accord with the ICRC's narrow view of direct participation in hostilities,<sup>12</sup> unlike the ICRC's approach with regard to membership of a non-state group, this approach would essentially restrict the state to taking defensive action. The state would be unable to take offensive action against members of an organized armed group who have committed to fighting for such a group. While it would minimise the possibility of error with regard to targeting of individuals, it would severely limit the ability of the state to defeat non-state groups, putting it on the

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<sup>12</sup> ICRC's *Interpretive Guidance on Direct Participation in Hostilities*, Section B, and Principles IV; V, VI & VII.

backfoot. This is not an approach that seems to have found favour in state practice or in the literature. Indeed, the ICRC rejects this approach.

### **Membership of an Armed Group as a Basis for Direct Attack**

18. Whether one takes the ICRC approach which deems that members of organized armed groups are not civilians, or one takes the approach of the NZDF that members of organized armed groups are civilians who are taking a direct part in hostilities continuously, the consequence of membership is loss of protection from direct attack. On either approach it would be lawful to put such a person on the JPEL once it is determined that they are a member of the organized armed group. However, on both approaches the difficult question that must be answered is how it should be determined that a person is a member of the group. The critical questions are what are the criteria for membership and how should an assessment be made on the facts when, unlike the case of membership of a state's armed forces, there will usually be no formal indicia of membership?
19. While Article 3 common to all four Geneva Conventions of 1949 and Article 1(1) of Additional Protocol I, refer in the context of non-international armed conflicts, to “members of armed forces”, “dissident armed forces” and “organized groups”, they neither provide a definition of such forces or groups, nor do they provide a criteria for membership. This means that membership of an organized armed group has to be determined on the basis of customary international law, aided by reference to the relevant literature. The most extensive study that has been conducted into this question was carried out by the ICRC in the *Interpretive Guidance on Direct Participation in Hostilities*. The ICRC notes that:

“it is crucial for the protection of the civilian population to distinguish a non-State party to a conflict (e.g., an insurgency, a rebellion, or a secessionist movement) from its armed forces (i.e., an organized armed group). As with State parties to armed conflicts, non-State parties comprise both fighting forces and supportive segments of the civilian population, such as political and humanitarian wings. The term organized armed group, however, refers exclusively to the armed or military wing of a non-State party: its armed forces in a functional sense. This distinction has important consequences for the

determination of membership in an organized armed group as opposed to other forms of affiliation with, or support for, a non-State party to the conflict.”<sup>13</sup>

20. It is membership in the armed or fighting or military wing of a non-state party - the organized armed group in the narrow sense - which would justify making an individual the object of an attack. Affiliation with the insurgency, or membership in the broader group that is in opposition with the government does not take a person out of the category of being a civilian, nor does it constitute direct participation in hostilities. The approach of the NZDF seems to be broadly in line with this approach though, as pointed out above, it the NZDF takes the view that a member of an organized armed group is civilian who is taking a direct part in hostilities continuously. The NZDF appears to consider an individual to be taking a direct part in hostilities on the basis of membership, where the individual “is a member of an organised armed group that collectively takes a direct part in hostilities”.<sup>14</sup> Thus, the group itself must be an armed one and it must itself take a direct part in hostilities. This would appear, correctly, to exclude subjecting to direct attack those who are only part of the political group that an armed group is part of.
21. However, identifying that a person must be part of the armed or fighting wing of a non-state party before they can be subjected to direct attack still leaves the question of how membership of that narrow group will be determined. The ICRC’s *Interpretive Guidance on Direct Participation in Hostilities* takes the view that:

“In non-international armed conflict, organized armed groups constitute the armed forces of a non-state party to the conflict and consist only of individuals whose continuous function is to take a direct part in hostilities (‘continuous combat function’).<sup>15</sup>

The ICRC goes on to state that:

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<sup>13</sup> ICRC’s *Interpretive Guidance on Direct Participation in Hostilities*, p. 32.

<sup>14</sup> *Legal Brief: Law of Armed Conflict Rules of Engagement, Operation Wātea*, slide 35.

<sup>15</sup> ICRC’s *Interpretive Guidance on Direct Participation in Hostilities*, Principle 2, second sentence, p. 27.

“Continuous combat function requires lasting integration into an organized armed group acting as the armed forces of a non-state party to an armed conflict. Thus, individuals whose continuous function involves the preparation, execution, or command of acts or operations amounting to direct participation in hostilities are assuming a continuous combat function.”<sup>16</sup>

22. This approach to membership of the group is a narrow one because it essentially confines membership of the organized armed group to those who fight. Those who do not have a fighting role are not regarded as members of the organized armed group. The approach has been the subject of criticism.<sup>17</sup> One of the main criticisms of this approach is that it introduces inequality into the law regarding targeting in non-international armed conflicts. All members of the state’s armed forces, with the exception of chaplains and medical personnel may be targeted (as they are not civilians) whether they take a direct part in hostilities or not. However, the state’s armed forces will include personnel who do not have a fighting function, for example, lawyers and cooks. While these personnel may be targeted as members of the state’s armed forces, the approach taken by the ICRC’s *Interpretive Guidance on Direct Participation in Hostilities* with respect to membership of organized armed groups, means that the cook affiliated with that group is not considered a member and thus may not be targeted.
23. While the ICRC’s “continuous combat function” approach has been criticised it can provide a useful working definition of membership which can guide the assessment of armed forces. It should be borne in mind that the ICRC approach does not require that a person has actually taken a direct part in hostilities, only that they have such a role within the group. Thus, “an individual recruited, trained and equipped by such a group to continuously and directly participate in hostilities on its behalf can be considered to assume a continuous combat function even before he or she first carries out a hostile act.”<sup>18</sup> It is also worth noting that since the ICRC approach is a narrow (perhaps the

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<sup>16</sup> ICRC’s *Interpretive Guidance on Direct Participation in Hostilities*, p. 34.

<sup>17</sup> See Sivakumaran, *The Law of Non-International Armed Conflict* (2012), pp. 360-363; Watkin, “Opportunity Lost: Organized Armed Groups and the ICRC ‘Direct Participation in Hostilities’ Interpretive Guidance”, (2010) 42 *New York University Journal of International Law and Politics* 641

<sup>18</sup> ICRC’s *Interpretive Guidance on Direct Participation in Hostilities*, p. 34.

narrowest) definition of membership, anyone who falls within the membership of a group by reference to this definition will almost certainly be a member of the group under other definitions. Problems only arise in cases where a person might fall outside membership of the group under this definition but would be regarded as a member under other definitions.

24. In particular, what the ICRC definition does not countenance is that there may be other ways in which membership of the organized armed group may come to exist other than being assigned a continuous combat function. This may include *de jure* membership (cases where the group has rules regarding membership and where such are fulfilled).<sup>19</sup> Other suggested criteria have been to consider membership in the group by analogy with the position of state armed forces such that persons who perform functions analogous to that which would be performed in a state armed force would be a member.<sup>20</sup> However, such an approach requires one to identify the sorts of functions carried out by armed forces and assumes that there will be consistency or uniformity so as to be able to generalise as to the functions that are performed by members.
25. On the ICRC approach to membership of an armed group, an individual can only be placed on the JPEL and a subsequent operation conducted to target them if the person has a role within an organized armed group which involves taking a direct part in hostilities (whether or not the person has actually done so). Thus, the state must have evidence of the functions that the individual performs or is tasked with performing within and by the organized armed group. In addition, it would need to be worked out which of those roles amounts to taking a direct part in hostilities. The question of what amounts to direct participation in hostilities is discussed below. For now, it is worth recalling that the ICRC stated that: “individuals whose continuous function involves the preparation, execution, or command of acts or operations amounting to direct participation in hostilities are assuming a continuous combat function.”<sup>21</sup>

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<sup>19</sup> See Sivakumaran, *The Law of Non-International Armed Conflict* (2012), pp. 360-363.

<sup>20</sup> See generally, Watkin, “Opportunity Lost: Organized Armed Groups and the ICRC ‘Direct Participation in Hostilities’ Interpretive Guidance”, (2010) 42 *New York University Journal of International Law and Politics* 641

<sup>21</sup> ICRC’s *Interpretive Guidance on Direct Participation in Hostilities*, p. 34.

## **Direct Participation in Hostilities**

26. As stated above, individuals can be made the object of an attack either because they are not civilians, or where they are civilians, because they are taking a direct part in hostilities. The previous section considered the possibility that an individual can be targeted on the basis of their status (they are not a civilian). This section considers the possibility of subjecting an individual to the use of force because they are a civilian and taking a direct part in hostilities (i.e targeting on the basis of conduct). Specifically, it is possible that an individual may be placed on the JPEL on the basis of direct participation in hostilities and that subsequently an operation is mounted to use lethal force against that person on this same basis. Consideration of the notion of direct participation in hostilities is important not merely because relevant IHL requires consideration of the issue but also because the Rules of Engagement applicable to NZDF, as amended in Dec 2009 and as they existed in May 2010 refers to this notion. In particular, Rule H stated that:

“Attack on individuals, forces or groups directly participating in hostilities in Afghanistan against the legitimate Afghan government, including . . .[redacted] is permitted.”

27. There are two relevant questions that arise with regard to the concept of direct participation in hostilities. First, what amounts to taking a direct part in hostilities? Since the protection from direct attack is only removed “for such time” as the individual is taking a direct part in hostilities, the temporal dimension of direct participation in hostilities becomes relevant. Thus, the second question to be asked is, when does a person begin or cease to take a direct part in hostilities? This latter question is particularly important with regard to the JPEL because the operation to use force against the individual is likely to occur at a significantly later point from the point in time when a determination is made that they should be placed on the list because they have taken (or are taking) a direct part in hostilities.
28. **What amounts to taking a direct part in hostilities?** In the previous section it was explained that there are at least two ways in which it may be considered that an individual has taken a direct participation in hostilities. The first way is to consider that the individual is taking a direct part in hostilities continuously where the individual is a member of an organized armed group. As discussed above, this is the approach that appears to have been

taken by NZDF in Afghanistan.<sup>22</sup> As already explained, it is my view that the concept of continuous direct participation does not accord with the structure of IHL. However, though this approach is conceptually different from the approach which considers that an individual may be targeted because they are not a civilian, in practice the two approaches lead to the same result. The effect of saying that an individual while a civilian is taking a direct part in hostilities continuously, on account of membership of an organized group, is effectively to say that the individual may be targeted at all times. While in theory, this approach to targeting is based on the conduct of the individual (he or she is directly participating in hostilities), in practice the individual has a status (based on membership of the armed group) which exposes them to the use of lethal force on a long-term basis. However, it should also be noted that the same difficulties that arise with regard to targeting on the basis of the individual not being a civilian (on account of membership of the group) arise here too. Thus, the same issues with regard to the definition of the group and definition of membership of the group have to be dealt with on this approach too. In my view the same solutions that were adopted above (principally the ICRC approach to membership with some modification that would permit *de jure* membership of groups) are open here too.

29. The second, and in my view,<sup>23</sup> the proper, basis on which it can be said that an individual has taken a direct part in hostilities is by examining specific acts that the individual has performed. If one adopts either the ICRC approach or the continuous direct participation approach, the specific acts approach provides an *additional* basis on which individuals may be subjected to lethal force. Thus, even if an individual is not a member of an organized armed group and subject to targeting on that basis, they one may examine the particular acts to see whether they would constitute direct participation in hostilities.
30. The NDZF takes the view that a person is taking a direct in hostilities when he or she engages in “hostile acts which are likely to cause actual harm to the personnel and

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<sup>22</sup> Legal Brief: *Law of Armed Conflict Rules of Engagement, Operation Wātea*, slide 35.

<sup>23</sup> See Akande, “Clearing the Fog of War? The ICRC’s Interpretive Guidance on Direct Participation in Hostilities”, (2010) 59 ICLQ 180 and ICRC’s *Interpretive Guidance on Direct Participation in Hostilities*, pp. 44-45.

equipment of coalition forces".<sup>24</sup> This definition is taken from the ICRC's *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*.<sup>25</sup> It is worth noting that this is probably a narrower definition of hostile acts than can be justified by state practice. As the Israel Supreme Court has noted acts which are intended to cause damage to civilians should also be regarded as hostile acts.<sup>26</sup> State practice would seem to accord with this because it seems to be the case that those who persons who engage in suicide or other attacks against civilians are regarded as taking a direct part in hostilities.

31. The ICRC's *Interpretive Guidance on Direct Participation in Hostilities* sets out three constitutive elements for the notion of direct participation in hostilities.<sup>27</sup>

"In order to qualify as direct participation in hostilities, a specific act must meet the following cumulative criteria:

1. the act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), and
2. there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and
3. the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus)."

32. The first of these three cumulative criteria is similar to the NZDF's definition of hostile acts except that, as with the Israeli Supreme Court, this first criterion takes a broader view of the sorts of harm that would count towards direct participation in hostilities. The third

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<sup>24</sup> Legal Brief: *Law of Armed Conflict Rules of Engagement, Operation Wātea*, slide 35.

<sup>25</sup> (1987), Commentary to Art. 51(3) of API, para. 1942, p. 618, with a similar commentary on Art. 13(3) of Additional Protocol II, para. 4787, p. 1453 "Hostilities have been defined as 'acts of war that by their nature or purpose struck at the personnel and *materiel* of enemy armed forces'."

<sup>26</sup> *Public Committee Against Torture in Israel v Govt of Israel* (13 Dec. 2006), esp. para. 39.

<sup>27</sup> Principle V, pa 46.

criterion makes clear that the harm caused by the hostile act must be directed at having an impact on the armed conflict, either in support of one party or by causing detriment to a party. Not all violence that occurs in the context of an armed conflict is part of the hostilities. Acts of self-defence by civilians against unlawful acts by members of armed forces will not constitute direct participation in hostilities that mean that those civilians may be the object of direct attack. Likewise, general civil unrest or looting will not be considered as having a belligerent nexus which deprives those participating in them of their protections under IHL from direct attack.<sup>28</sup>

33. It is the second criterion of a direct causal link between the act and the harm that is the most difficult to apply of these three criteria. Clearly taking up arms and using them offensively against members of the state's armed forces will constitute direct participation in hostilities. However, it has been unclear whether activities such as providing finance to a non-state group or recruiting individuals for the group's operations or making improvised explosive devices would count as direct participation in hostilities. The ICRC suggests that direct causation means "that the harm in question must be brought about in one causal step"<sup>29</sup> from the relevant act or the integrated military operation of which act is a part. Thus, financing would not constitute direct participation in hostilities given that it merely builds up the capacity of a party to cause harm, and the harm that may result from it will be more than one causal step away from the provision of finance. Controversially, the ICRC's criteria suggest that the making of a weapon, like an improvised explosive device will not in and of itself amount to direct participation.<sup>30</sup> Whether it does will depend on whether the weapons are made for storage and for building up the armoury of the group, on the one hand, or for use in a specific operation, on the other hand. If the latter, then harm would result in one causal step from an integrated military operation of which the act forms a part. However, if the former, this would be indirect rather than direct participation in hostilities.

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<sup>28</sup> ICRC's *Interpretive Guidance on Direct Participation in Hostilities*, pp. 58-64.

<sup>29</sup> ICRC's *Interpretive Guidance on Direct Participation in Hostilities*, pp. 58-64.

<sup>30</sup> ICRC's *Interpretive Guidance on Direct Participation in Hostilities*, pp. 53-54.

34. Although the one causal step criterion has been subjected to criticism, it provides a useful analytical tool for making determinations as to direct participation in hostilities. Also, the text and structure of the provisions in the Additional Protocols dealing with direct participation in hostilities do suggest that it should be given a narrow interpretation. The text speaks not of participation in the armed conflict but of participation in hostilities, which is narrower than being involved in the conflict in general. Also, the participation must be direct, meaning that not all participation in military activities would suffice.
35. **The Temporal Dimension of Direct Participation in Hostilities:** Individuals who take a direct part in hostilities will lose their protection from direct attack only “for such time” as they take a direct part in hostilities. The question that then arises is for how long should an individual be regarded as taking a direct part in hostilities. This is relevant to the JPEL in that if an individual is placed on that list because they are considered to be a civilian taking a direct part in hostilities, an operation may only be carried out to kill that individual if he or she is still taking a direct part in hostilities at the time of the operation.
36. The continuous direct participation approach suggests that the individual will be regarded as taking a direct part in hostilities for such time as they continue to be a member of the group. While this is a rather broad view of the temporal scope of direct participation in hostilities, even if the approach were wrong there would be no violation of IHL as the individual in question being a member of the group may be considered as no longer a civilian and thus a lawful target. Thus, if a person is placed on the JPEL as a result of membership of a group, they may be targeted as long as they remain a member of the group.
37. Although the specific acts approach to the notion of direct participation in hostilities focuses on particular acts which constitute the participation in hostilities, it is commonly accepted that the temporal scope of such participation is broader than the phase of execution of those specific acts. As the ICRC’s *Interpretive Guidance on Direct Participation in Hostilities* states:

“Measures preparatory to the execution of a specific act of direct participation in hostilities, as well as the deployment to and the return from the location of its execution, constitute an integral part of that act.”

38. If a person were to be placed on the JPEL as a result of engagement in specific hostile acts which amount to direct participation in hostilities (as opposed to membership of a group that is engaging in hostilities), an operation may only be carried out to use force against that person if at the time of the operation they were either preparing for another specific act of direct participation, executing such an act or returning from that act. It would be contrary to IHL to target the person simply on the basis of the prior act of direct participation in hostilities.
39. The NZDF appears to take the view that another way in which a person might be found to be taking a direct part in hostilities is by being in “the revolving door”. The NZDF Legal Brief states that “those attempting to be ‘farmers by day and fighters by night’ lose protection from attack even in the periods between hostile acts”.<sup>31</sup> Adoption of this approach would significantly broaden the temporal scope of direct participation in hostilities. Though put forward as an independent basis for targeting, this approach is best considered to be an application of the membership approach in the case of an individual who is affiliated with a group. Here, the suggestion is that by constantly taking part in hostile acts the individual has in reality joined the group and thus may be attacked at all times, even when not taking a direct part in hostilities.<sup>32</sup>
40. However, where the individual is not affiliated with any group and acts on their own, extending the temporal scope of direct participation in hostilities in “revolving door” cases would be contrary to the specific acts approach which suggests that an individual only loses protection for such time as they engage in specific acts of direct participation. This application of the continuous direct participation approach beyond situations of membership of a group would in my opinion be contrary to the narrow approach to direct participation in hostilities.

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<sup>31</sup> *Legal Brief: Law of Armed Conflict Rules of Engagement, Operation Wātea*, slide 35.

<sup>32</sup> *Public Committee Against Torture in Israel v Govt of Israel* (13 Dec. 2006), esp. para. 39: “On the other hand, a civilian who has joined a terrorist organization which has become his “home”, and in the framework of his role in that organization he commits a chain of hostilities, with short periods of rest between them, loses his immunity from attack “for such time” as he is committing the chain of acts. Indeed, regarding such a civilian, the rest between hostilities is nothing other than preparation for the next hostility ...”

## **Application of IHL Principles to the Hypothetical Scenario**

41. In the hypothetical scenario that I have been provided with, the questions I am to address are:
  - i. whether individuals who have been identified as insurgents, or leader of insurgents, who have conducted attacks with Improvised Explosive Devices in Bamyan Province in Afghanistan and who are planning to carry out further attacks should be placed on the JPEL list; and
  - ii. whether an operation may lawfully be mounted to kill or capture such individuals when the opportunity arises.
42. In assessing whether lethal force may be used against these leaders, I will assume that these attacks have occurred in the context of the non-international armed conflict that has been occurring in Afghanistan for several years.
43. In order for these individuals to be placed on the JPEL list and to be targeted, it would have to be established that either they are not civilians or that they are civilians who are taking a direct part in hostilities at the time when it is sought to target them.
44. If all of these individuals are part of an organized armed group that is engaged in the conflict, there would be two possible basis for making them the object of attack: (1) that they are members of the group and thus not civilians protected by IHL from direct attack; or (2) that on the basis of their membership of the group they are civilians taking a direct part in hostilities on a continuous basis. On either theory, these persons would be open to direct attack at any time, even in periods when they are not engaged in specific hostile acts.
45. For either of theories in the preceding paragraph to be invoked it would need to be established that these individuals are “members” of the group. Taking the approach adopted by the ICRC’s *Interpretive Guidance on Direct Participation in Hostilities* all those who have a continuous combat function (i.e have as part of their role within the group the functions of taking a direct part in hostilities) will be members of the group and thus liable to direct attack at all times. The following summarises the conclusion to be reached adopting this approach:

- i. Those insurgents who plant improvised explosive devices have a function of taking a direct part in hostilities since that act fulfils the criteria for direct participation in hostilities. On the basis of their membership in the organized group they are liable to attack at all times.
- ii. Those who command the operations of the insurgents that plant the improvised explosive devices also have a function of taking a direct part in hostilities since those people take part in coordinated military operations that cause harm to opposing forces or to civilians. On the basis of their membership in the organized group they are liable to attack at all times.
- iii. In neither of the foregoing cases does it even have to be shown that the person concerned is planning a further attack, though this is helpful in establishing that they have a function within the group that includes taking a direct part in hostilities.
- iv. It is more difficult to assess the liability of those who make and prepare the improvised explosive devices. Where the person makes the device for a particular operation, the person is taking part in a coordinated military operation that causes harm and is therefore in a role that entails taking a direct part in hostilities. Such a person is a member of the group and can be targeted at all times.
- v. Where a person makes the improvised explosive device not for use in a particular operation but for storage and to build up the capacity of the armed group, that person is not engaging in activities that amount to direct participation in hostilities. Thus, on the ICRC test, such a person remains a civilian protected from direct attack.
- vi. However, if one accepts that the test for membership of an organized armed group can be broader than that proposed by the ICRC, one may assess whether these individuals are members of the group on the basis that they fulfil the membership rules of the organization in question. On this basis individuals would be members whether or not they engage in acts which show that they have a combat function. Thus, a maker of improvised explosive device for storage may qualify for membership where there is evidence to that effect.

## **Does IHL Require a Capture rather than Kill Approach?**

46. Where a party to an armed conflict has come to the conclusion that a person it wishes to target with lethal force is not a civilian or is a civilian taking a direct part in hostilities, the question may still be raised whether that party is permitted, as a matter of IHL, to target the person where it is possible or even reasonable to use lesser means to disable the threat posed by that person. The question is often asked whether IHL requires a capture rather than kill approach?
47. One of the most controversial aspect of the ICRC's *Interpretive Guidance on Direct Participation in Hostilities* is the penultimate principle which states that:

**"IX. Restraints on the use of force in direct attack:** In addition to the restraints imposed by international humanitarian law on specific means and methods of warfare, and without prejudice to further restrictions that may arise under other applicable branches of international law, the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances."

48. This principle suggests that even if one reaches the conclusion that a person is one of those that IHL says may be targeted, a party to a conflict must as a general matter consider whether it is necessary to do so. In other words, where it is possible to disable the threat from that person by several means, the party to the conflict should use the least harmful means can be employed taking the circumstances into account.
49. This principle is said to be based on a general principle of military necessity which stipulates that belligerent parties can only take such action as is necessary to overcome the other party, even if the proposed action is not prohibited by principles of IHL.<sup>33</sup> So if a person can be captured rather than killed, there is an obligation to do so even in cases where the person is not a civilian or where he is a civilian taking a direct part in hostilities.

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<sup>33</sup> ICRC's *Interpretive Guidance on Direct Participation in Hostilities*, pp. 78-82.

50. This view of the law finds support in the *Targeted Killings* case.<sup>34</sup> However, it is not certain that that Court was seeking to apply principles of IHL in this part of the decision. The court cited the ECHR's decision in *McCann v. United Kingdom*<sup>35</sup> and it is therefore likely that this least harmful means approach was an importation from human rights law.<sup>36</sup>
51. The argument that IHL does take this approach is made by the author of the ICRC's Interpretive Guidance, Dr Nils Melzer in his monograph.<sup>37</sup> In Melzer's view, the principle of military necessity not only has a permissive function but also has a restrictive function. In his view, this restrictive function is a general principle which underlies all of IHL and which means that even when specific principles of IHL do not forbid action that action is forbidden where not justified by military necessity. Thus military necessity acts as an additional level of restraint on belligerents in addition to specific rules of IHL.
52. There is some support for this general view of military necessity in military manuals.<sup>38</sup> However, there seems to be no practice of States in which it is contended that the targeting of individuals who are members of armed forces or civilians taking a direct part in hostilities are nevertheless unlawful because such targeting was not necessary in the particular case.
53. Given that there is a principle which specifically prohibits the use of weapons which cause unnecessary suffering to combatants<sup>39</sup> it appears strange that no specific principle has emerged prohibited unnecessary targeting if the view is taken that the general doctrine of

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<sup>34</sup> *Public Committee Against Torture in Israel v Government of Israel*, Supreme Court of Israel, HCJ 769/02 (13 Dec 2006), para. 40.

<sup>35</sup> (1995) 21 E.H.R.R. 97.

<sup>36</sup> *Harvard University Program on Humanitarian Policy and Conflict Research, Policy Brief*, 'IHL and Civilian Participation in the Hostilities in the OPT' (2007), available at <http://hpcresearch.org/pdfs/ParticipationBrief.pdf>, p. 12.

<sup>37</sup> N Melzer, *Targeted Killing in International Law* (Oxford University Press, Oxford, 2008), 278 and ff.

<sup>38</sup> See, for example, C. Greenwood, "Historical Development and Legal Basis", in D Fleck, *The Handbook of Humanitarian Law in Armed Conflicts* (2nd ed, Oxford, 2008), §131 & p. 38.; United Kingdom Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford University Press, Oxford 2004), p. 21-22; United States Department of the Navy, *Commander's Handbook on the Law of Naval Operations* (Office of the Chief of Naval Operations, Washington DC 1989), §5.3.1; Instructions for the Government of Armies of the United States in the Field (Lieber Code), 24 April 1863, Art. 14.

<sup>39</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reps, 1996, p. 226, at para. 78

military necessity leads to such a conclusion. What is strange is that is that the general doctrine of military necessity has led to the development of a specific principle with regard to weaponry and suffering caused by weaponry but States have refrained from elucidating a specific principle about the act of targeting of combatants when such targeting is not necessary. It would seem that this silence is not accidental.

54. In the context of targeting of persons, the view may be taken that IHL has already made the calculation as to what is necessary from the military perspective. In other words, the view may be taken that IHL has already determined the range of persons against whom lethal force may be used and this determination is already based on ground of military necessity. Therefore, no further and more specific restraints exist with regard to who is subject to lethal force.
55. Application of a more specific capture rather kill approach may be difficult to apply given that those engaged in the conduct of hostilities may not be in a position to know that it is possible to disable a threat by capturing rather than by killing. In the more traditional battlefield situations, soldiers may not be aware that if they refrain from targeting members of the opposing force in their sight, it would be possible (perhaps even easier) for colleagues placed elsewhere to capture those opposing belligerents.

## **Part II - Application of Human Rights Law to the Conflict in Afghanistan**

56. Although IHL is that part of international law that is specifically designed for application in conflict it is not the only part of international law that applies during armed conflict. Human Rights law, in particular, a state's obligations under international human rights treaties are also potentially applicable in armed conflicts.
57. Three questions arise with regard to the application of international human rights in armed conflict:
  - i. Does international human rights law apply at all in situations of armed conflict?
  - ii. Does a state have obligations under international human rights treaties when its armed forces act outside of its territory?
  - iii. If human rights law applies to an armed conflict, what is the relationship between that body of law and international humanitarian law?

58. The answer to the first question is clear. Every international tribunal that has considered the question has held that human rights law continues to apply in armed conflict. The International Court of Justice has stated that:

“... the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights.”<sup>40</sup>

59. Extensive state practice, including the practice of states through international bodies such as the UN Security Council, the UN Human Rights Council, the UN General Assembly confirms this position.

60. The question of extraterritorial application of human rights treaties is more difficult. This is because a number of treaties, including the International Covenant on Civil and Political Rights (ICCPR) include provisions which limit their application to individuals within the jurisdiction or territory of state parties. Art. 2(1) of the ICCPR provides that:

“Each State party to the present Covenant undertakes to respect and to ensure respect to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant . . .” (emphasis added).

61. However, despite such provisions human rights courts, and treaty monitoring bodies such as the UN Human Rights Committee, have held that a person is within the jurisdiction of a state when such a person is subject to state authority or control. Thus, a state party will have obligations to ensure the rights of persons within their power or effective control. Interpreting Art. 2 of the ICCPR, the UN Human Rights Committee, which is charged with monitoring compliance with the ICCPR stated in General Comment No. 31 that:

“a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not

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<sup>40</sup> *Legal Consequences Arising from the Israeli Wall in Palestine. Advisory Opinion* ICJ Reports, 2004, para. 106. See also *Legality of the Threat or Use of Nuclear Weapons*, ICJ Rep, 1996, p. 66; 110 ILR 1; especially paras. 24 – 25; *Armed Activities on the Territory of the Congo (Democratic Rep. of Congo v. Uganda)*, ICJ Rep. 2005, especially paras. 181-221.

situated within the territory of the State Party . . . . This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained . . . .”

62. Where a state is in control of territory that an individual is located in, the state will have the obligation to respect the right to life. Likewise, where the individual is at a location (eg a military base, a ship, a plane) over which the state has effective control, the state will have the obligation to respect the right to life of the individual.
63. However, it has been unclear whether the state must respect the right to life under human rights treaties in circumstances where the state does not control the physical space where the individual is located. Arguably, where the state does not exercise control over the territory but does exercise control over a person, the state has a duty to respect the rights of that person. And it may be argued that what greater control can be exercised over a person than the ability to take that individual's life? Thus, it may be argued that if the state has the ability to take the individual's life it has sufficient control to trigger the state's human rights obligations. The European Court of Human Rights, in its decision in *Al Skeini v United Kingdom* nearly went this far.<sup>41</sup> However, it pulled back and based its decision that the UK owed human rights obligation in Iraq on the ground that it was exercising “some of the public powers normally to be exercised by a sovereign government.”<sup>42</sup>

64. More recently, the Human Rights Committee has stated in that:

“In light of article 2, paragraph 1, of the Covenant, a State party has an obligation to respect and to ensure the rights under article 6 [the right to life] of

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<sup>41</sup> *Al Skeini v. United Kingdom*, Application no. 55721/07, Grand Chamber, 7 July 2011: “. . . the Court's case-law demonstrates that, in certain circumstances, the use of force by a State's agents operating outside its territory may bring the individual thereby brought under the control of the State's authorities into the State's Article 1 jurisdiction. This principle has been applied where an individual is taken into the custody of State agents abroad... The Court does not consider that jurisdiction in the above cases arose solely from the control exercised by the Contracting State over the buildings, aircraft or ship in which the individuals were held. What is decisive in such cases is the exercise of physical power and control over the person in question. . . .”

It is clear that, whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual.” para. 136-137

<sup>42</sup> Para. 149

all persons who are within its territory and all persons subject to its jurisdiction, that is, all persons over whose enjoyment of the right to life it exercises power or effective control. This includes persons located outside any territory effectively controlled by the State, whose right to life is nonetheless impacted by its military or other activities in a direct and reasonably foreseeable manner.”<sup>43</sup>

65. This paragraph appears to hold that what is important is that the enjoyment of the right to life is within the power or effective control of the state. As the last sentence quoted above demonstrates, there is an obligation to respect the right to life even where the person is not in territory controlled by the state.
66. Since both human rights and international humanitarian law apply in situations of armed conflict, perhaps the most difficult question that arises is what is the relationship between both bodies of law. It is sometimes argued that this question is to be answered by reference to the concept of *lex specialis*. However, whether this is correct depends on what that concept is taken to mean. There are three possible meanings of the expression.
67. First *lex specialis* could mean that one body of law totally displaces another body of law. Given the jurisprudence referred to above, this is clearly incorrect.
68. Second *lex specialis* could operate as a principle of “co-ordinated interpretation”. This is the idea that a concept or rule in one area of law can be used to interpret or give meaning to a concept or rule in another area of law. In this way both principles or concepts are given the same meaning. This principle can be justified by reference to Article 31(3)(c) of the Vienna Convention of the Law of Treaties which says that interpreting a treaty, the interpreter is to take into account any relevant rules of international law applicable in the relations between the parties.

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<sup>43</sup> General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life

69. The ICJ applied this conception of *lex specialis* and this idea of co-ordinated interpretation in the *Nuclear Weapons Advisory Opinion* when it said that the right not be arbitrarily deprived of one's life under Article 6 of the International Covenant and Political Rights is to be interpreted, in situations of armed conflict, by reference to international humanitarian law such that a loss of life contrary to humanitarian law that will be regarded as arbitrary under human rights law.
70. A third way of understanding the *lex specialis* principle is to regard it as operating as an arbiter of conflict. On this view one accepts that both humanitarian law and human rights law may apply in armed conflict but one says that in cases where 2 principles are in conflict from each area of law, one uses *lex specialis* concept as the arbiter of the conflict. In this case the principle derived from the *lex specialis* applies and the other principle is displaced and does not apply. It is often said that it is IHL that is *lex specialis* and that it will displace human rights law obligations in situations of armed conflict (though it is worth noting that if one accepts this conception of *lex specialis* IHL need not be the *lex specialis* in all cases). So this conception of *lex specialis* is a partial displacement theory of the relationship between the two bodies of law. Unlike the first case one body of law is not completely displaced, it is only partially displaced where there is conflict.
71. In my view, this conception of the relationship between the two bodies of law is not consistent with general international law. This view assumes that states may not assume or undertake inconsistent obligations under international law. However, though it may not be desirable, states do on occasion undertake obligations that may require them to act differently or even inconsistently with prior or other obligations.

### **Human Rights Law and Targeted Killing**

72. If one takes the second meaning of *lex specialis* (the meaning given to it by the ICJ) it would lead to the result that, even if one comes to the conclusion that a state has the obligation to respect the right to life in a conflict outside its territory, the right is respected in situations of armed conflict as long as the state acts in conformity with IHL. On this view, where there is no violation of IHL there is no violation of human rights.

73. There have been discussions in the literature as to the relationship between the use of force under the conduct of hostilities paradigm and the law enforcement paradigm.<sup>44</sup> In my opinion, this way of addressing matters does not illuminate the problems. It is not clear whether the conduct of hostilities paradigm is just another way of referring to IHL and the law enforcement paradigm a way of referring to international human rights law (IHRL). It is not clear what brings a matter within the conduct of hostilities paradigm except to say that it is governed by IHL. There are no objective factors that have been developed to distinguish between these paradigms except a circular reference to the bodies of law that apply within those paradigms.
74. The two critical questions that arise in this area are: First, whether IHL applies to govern all targeting of legitimate military objectives in the context of an armed conflict. Or whether, by contrast, there are some principles that limit the application of IHL to particular geographical areas (eg conflict zones or zones where a party does not have effective control). The question of whether IHL requires a party to adopt a capture rather than kill has already been discussed and in my opinion it does not. It is also difficult to point to practice that limits the application of IHL to the targeting of legitimate military objectives.
75. The second is whether it really is correct to say that with respect to the arbitrary deprivation of life, what is lawful under IHL will always be lawful under IHRL (as the ICJ suggested). It is not clear that human rights bodies will always accept this position as a matter of human rights law, particular in the case of non-international armed conflicts. There are many cases where human rights bodies have applied human rights law to acts in non-international armed conflicts without having regard to IHL at all. While it is true that in most of these cases, the state concerned has not even pleaded IHL (perhaps because it has wished not to admit that there was an armed conflict on its territory), it may be predicted that it will be difficult for some courts to turn the clock back and to ignore established principles of human rights law completely. It is within human rights law, that a distinction may begin to be drawn between acts carried out in the context of active hostilities where there is

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<sup>44</sup> See *ICRC Report of Expert Meeting on The Use of Force in Armed Conflicts: The Interplay Between the Conduct of Hostilities and Law Enforcement Paradigms*, (2013)

sustained and concerted fighting and or the state lack's effective territorial control (on the one hand) and security operations where there are no active hostilities (on the other hand).<sup>45</sup>

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<sup>45</sup> See Murray, Akande, Garraway, Hampson, Lubell & Wilmshurst, *Practitioner's Guide to Human Rights in Armed Conflict* (2016), Ch. 4